

Weng (Migration) [2020] AATA 6212 (20 July 2020)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Yunan Weng Mrs Zi Lin Miss Linhan Weng Mr Chengxu Lin
REPRESENTATIVE:	Mr Hang Chen (MARN: 0854662)
CASE NUMBER:	2109409
HOME AFFAIRS REFERENCE(S):	BCC2020/2674664
MEMBER:	Peter Emmerton
DATE:	20 July 2020
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits all of the applications for GK – Temporary Skill Shortage (Class GK) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 482 - Temporary Skill Shortage visas: • Public Interest Criterion 4020 for the purposes of cl 482.217 of Schedule 2 to the Regulations

Statement made on 20 July 2022 at 12:29pm

CATCHWORDS

MIGRATION – Temporary Skill Shortage (Class GK) visa – Subclass 482 (Temporary Skill Shortage) – false or misleading information – work history – Skilled Meat Worker – communications between the Department and the overseas Post – privacy issues – skills assessment undertaken by Teys Australia – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 482.217; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 8 July 2021 to refuse to grant the applicants GK – Temporary Skill Shortage (Class GK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicants applied for the visas on 20 November 2020. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 482.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). They were not satisfied that the applicant is able to satisfy cl. 482.217 because they had not met the requirements of PIC 4020(1).
5. The applicants appeared before the Tribunal, via video on 20 July 2022 to give evidence and present arguments. The Tribunal also received oral evidence, from Ms Jackie Duffield, the visa applicant's Supervisor at Thomas Foods.
6. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
7. The applicants were not represented in relation to the review hearing.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 482.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. The Tribunal asked the applicant if he had provided incorrect or inaccurate information regarding his work experience, either deliberately or inadvertently as claimed by the Minister's delegate in their Decision dated 8 July 2021. He responded in the negative.
15. The delegate asserted that on 30 September 2016 the applicant provided evidence to the Department that was considered to be of a 'non-genuine' nature with their application for a Temp Work (Skilled) Principal Applicant Offshore (UC 457) Visa. This subsequently meant that the applicant could not satisfy PIC 4020 in relation to their 482-visa. The document dated 23 September 2016 contained the working history of the applicant and was signed by the manager 'Yueguang WU' stating that the applicant has worked at Fijian Province Minqing County Meicheng Livestock Slaughterhouse from 20 November 2012 until 30 September 2016. The Tribunal notes that this refers to events which may have taken place 6 years ago.
16. The applicant had relied on this information document to satisfy Regulation 457.223(2)(d) of Schedule 2 of the Migration Regulations. The application for their Temp Work (Skilled) Principal Applicant Offshore (UC 457) Visa had been by the granted Department on 25 November 2016.
17. The Department completed a phone integrity check through an overseas Post to verify the working certificate on 6 January 2021, (approximately 6 years after the 457-visa application). It was determined from the phone integrity check that Minqing County Meicheng Livestock Slaughterhouse had never employed the applicant.
18. The applicant was provided with 28 days to provide comment on the suspected 'nongenuine' information supplied to the Department. The invitation to comment was sent to the applicant on 17 February 2021.
19. The applicant responded with a submission dated 1 March 2021 signed by the Human Resources Manager, Zhennan Chen of the Fujian Province Minqing County Meicheng

Livestock Slaughterhouse, payslips for the months of March 2013, April 2013, July 2015 and August 2016, and a statement from the Manager Yueguang Wu. The Tribunal viewed the documents and verified the relationship with the visa applicant during the hearing.

20. The delegate concluded that the information provided was inconclusive and inconsistent. The Manager had stated when contacted that they don't provide Pay Slips, subsequently some were provided which were internally generated. No verifiable corroborating evidence was supplied to support the veracity of the Pay Slips. In addition, the Manager claimed that the contact made by the department had been with the parent company with the ultimate oversight of the slaughterhouse, who do not maintain staff records of the slaughterhouse employees. The delegate chose to place limited weight on the statement as it was not independently verifiable. It would appear that no attempts were made to verify this information by the Department.
21. The Department was subsequently provided with a statement from the relevant HR Manager, Mr Zhennan Chen, dated 7 May 2021, which was provided at the request of the visa applicant. The statement reproduced below offers an explanation for the disconnection between the information sought and the concerning responses. The Tribunal notes that a letter attesting to the validity of Mr Z Chen's position within the company was provided by the Manager, Mr Yueguang Wu.

22. ***'Fujian Province Minqing County Meicheng Livestock Slaughterhouse***

23. *Address: Hutouwan, Tankou Village, Yunlong Town, Minqing County, Fujian Province
Phone:0591-22593566*

24. *At the request of Mr. Weng Yunan, I will give the following explanation for the telephone interview I received on 28 April:*

25. *Fujian Province Minqing County Meicheng Livestock slaughterhouse is an enterprise that different from the Minqing County Food Company. It has its own independent personnel and management rights. Both the registered legal representative and general manager of the slaughterhouse are Wu Yueguang.*

26. *In the telephone interview on 28 April you asked who the plant manager was, and I answered Liu Xinning. But you mistakenly understood that the boss is Liu Xinning, and this is a mistake in your understanding. Liu Xinning is the plant manager who manages production. He is not the boss. The boss is Wu Yueguang.*

27. *In the telephone interview, we also mentioned the pay slip, which involves the privacy of the workers and our factory. It is impossible for us to tell unidentified people this information on the phone. We of course have the pay slips for financial management and reconciliation. But if you need this information, we can only provide it unless the worker himself requests it.*

28. *When the Australian consulate made the telephone interview, we are not advised the identity and name, and we were unable to prove the identity of the other party, so we could not fully cooperate. We even doubt whether the identity of the other party is true. Out of respect, we still cooperate with you.'*

29. The Tribunal explored this information with the applicant, checking on the provision of pay Slips and the cash method of wages payment. The answers were consistent with the statements and explanations made in the correspondence.
30. The Tribunal notes the following:

- The potential imprecise nature of the communications which occurred between the Department via the overseas Post. It appears, unsurprisingly, that the Department is unlikely to have understood the differentiation between the overarching parent company and the slaughterhouse company. The Tribunal believes it is likely they may not have been communicating with the appropriate person in the appropriate company and it would have been very difficult to determine this issue at the time. This was further complicated as the delegate was relying upon information which was being relayed to them by a remote party, who was possibly not intimately acquainted with the intricacies of the issue.
 - The failure to understand the management structure and the confusion as to who was in executive positions and therefore capable of answering requests for information accurately.
 - The overseas Post did not appear to understand or appreciate that there would be privacy issues associated with the Pay Slips.
 - The company being interrogated was not fully cooperative as they were unable to verify the bona fides of the Australian Consulate. This may have been a particularly sensitive issue at the time which would not have been discussed. There were well publicised “challenges” in the relationship between China and Australia and under such circumstances it is understandable that a cautionary approach was engaged by the company in responding to the officials of Australia, particularly if they were unsure of their legitimate bona fides.
 - The internal operation of businesses in China remains somewhat opaque.
31. The Tribunal has concluded that the explanation provided by the applicant and the HR Manager are entirely plausible and most likely accurate.
 32. When exploring the visa applicant’s work skills with his supervisor at Thomas Foods, the Tribunal was satisfied that she believed that the applicant had skills that had been learnt prior to him working in her department. It is reasonable to assume that these foundation skills were obtained whilst working in China. It was explained to the Tribunal that the standards in Australia are considerably higher than those expected in many countries, China being such a place. Our safe food handling procedures, cuts of meat, equipment and machinery were areas discussed with the witness during the hearing. The Tribunal found the witness very helpful and measured in her responses, at all times, whilst being careful to provide accurate assessments and proffering additional details to ensure the Tribunal was able to accurately understand what was being explained.
 33. The Tribunal has been provided with a detailed, skill category specific skills assessment document undertaken by Teys Australia on 29 September 2020. The assessment was conducted in compliance with Schedule 4 – Skilled Meat Worker (a) of that labour Agreement. The assessment concluded that the visa applicant had met the requirements and has a minimum skill level commensurate with an AQF Certificate III (3) qualification in Meat Processing. It is clearly not possible to have reached this standard without substantial prior practical work experience in this field. This supports the assertion that the previous work experience was in fact accurate.
 34. The Tribunal has formed the view that it cannot be satisfied that there is evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for

the visa or a visa that the applicant held in the 12 months before the application was made:
PIC 4020(1)

35. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

36. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
37. The Tribunal has no evidence before it that the applicant or any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1)
38. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

39. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
40. In Australia, the National Identity Proofing Guidelines, established by the Attorney-General's Department, defines identity as "... some combination of characteristics or attributes that allow a person to be uniquely distinguished from others within a specific context". The Department of Home Affairs (the Department) relies on a system that establishes a migrant's identity by exploring the 'three pillars of identity', regardless of whether they are applying for protection or more regular migration pathways. The three pillars are: biometrics (physical attributes); documentation; and narrative. The narrative pillar comprises both objective data points such as nationality and ethnicity and subjective material including family composition, schooling, employment and training, or travel history.
41. The Tribunal having reviewed the visa applicants Passport photographs and details in conjunction with the verified relevant life and work history, has concluded that the identity of the visa applicants is as asserted by them. The Tribunal has also checked and compared the photographs provided in relation to the Passport of the applicant and the IELTS test results certificate. The Tribunal does not have any evidence before it to demonstrate a different conclusion is warranted.
42. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

43. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
44. There is no evidence before the Tribunal that the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused.

45. Therefore PIC 4020(2B) is met.
46. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl 482.217.

47.

DECISION

48. The Tribunal remits all of the applications for GK – Temporary Skill Shortage (Class GK) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 482 - Temporary Skill Shortage visas:
- Public Interest Criterion 4020 for the purposes of cl 482.217 of Schedule 2 to the Regulations

Peter Emmerton
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...